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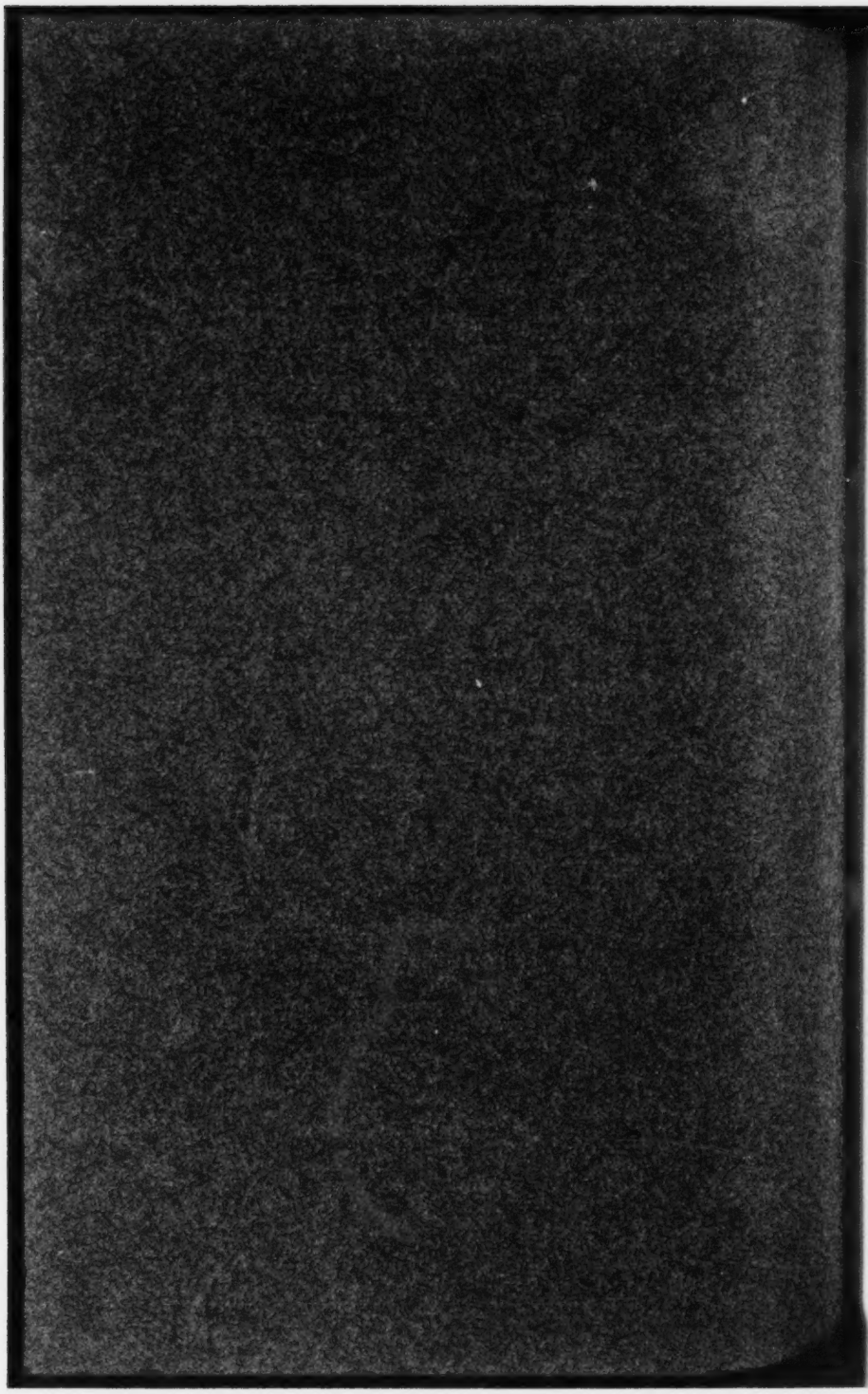

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 762

JOHN H. McGLOON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinions were rendered by the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 15, 1941 (R. 65–66). The petition for writ of certiorari was filed February 12, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Pro-

cedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the questions as to the constitutionality of the registration provisions of the Securities Exchange Act of 1934 are properly before the Court.

2. Assuming that they are, whether those provisions properly delegate rule-making power to the Securities and Exchange Commission and whether that portion of the statute under which petitioner was convicted sets up a fixed and definite standard of guilt.

3. Whether petitioner was subject to the provision of Section 32 (a) of the Securities Exchange Act of 1934, under which he was convicted.

4. Whether the count of the indictment upon which petitioner was convicted alleges that the false and misleading statements were made *in* the documents filed.

STATUTES INVOLVED

Petitioner was convicted under a provision of Section 32 (a) of the Securities Exchange Act of 1934, as amended, which makes it punishable for any person willfully and knowingly to make or cause to be made materially false or misleading statements in documents filed pursuant to the requirements of the Act and the rules and regulations

thereunder. The documents were filed pursuant to Section 13 of that Act which requires issuers of securities registered on a national securities exchange to file periodical reports in order to keep reasonably current data filed under Section 12 (b), the registration provision of the Act. Under both Sections 12 and 13, the Securities and Exchange Commission is authorized to prescribe, by rule and regulation, the detailed information to be filed. General rule-making provisions are contained in Section 23. A provision of Section 32 (a) penalizes the willful violation of any provision of the Act or rules thereunder. Separability of provisions is provided by Section 33. The text of these sections is set out in the Appendix, *infra*, pp. 15–20.

STATEMENT

On March 30, 1939, an indictment in fourteen counts was returned against the petitioner and eight others[1] in the District Court for the Southern District of New York (R. 1, 3–32). The first ten counts charged violations of the mail fraud statute (U. S. C., Title 18, Section 338); the eleventh, twelfth, and thirteenth counts, violations of Section 32 of the Securities Exchange Act of 1934, as amended (U. S. C., Title 15, Section

[1] The following defendants pleaded guilty to all counts of the indictment: Arthur Musica (R. 34, 40); Benjamin Simon (R. 35, 40); George Musica (R. 35, 40); Robert Musica (R. 35, 40); John O. Jenkins (R. 36, 41). The defendant Leonard Jenkins pleaded guilty to the fourteenth count (R. 36, 42).

78 ff.); and the fourteenth count, a conspiracy to violate the mail fraud statute and the Securities Exchange Act of 1934, as amended.

On April 5, 1939, the petitioner was arraigned and pleaded not guilty (R. 34, 39). No attack upon the indictment was made prior to trial (R. 33–37). On September 20, 1939, the United States Attorney furnished the petitioner with a letter of particulars (R. 46). No further particulars were sought by the petitioner. The case came to trial before a jury on March 7, 1940 (R. 35, 41), after which, on March 8, 1940, motions to dismiss each count of the indictment were denied (R. 35, 41).[2]

A verdict of guilty on count thirteen and not guilty on the remaining counts was returned by the jury as to the petitioner on May 18, 1939 (R. 37, 42).[3] Petitioner was sentenced to imprisonment for a year and a day and fined $5,000 (R. 37, 43).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of the trial court was affirmed *per curiam* (R. 65–66).

ARGUMENT

I

The petitioner's contention with respect to the constitutionality of the registration provisions of the Securities Exchange Act of 1934 (Sections 12

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[2] The grounds of petitioner's motion appear only in his assignment of errors (R. 50 *et seq.*).

[3] A verdict of not guilty was returned by the jury as to Horance B. Merwin and Rowley W. Phillips, the two defendants who stood trial with the petitioner (R. 37, 42).

and 13) are not properly before the Court, since petitioner was not charged with the violation of those provisions. The indictment[4] charged that on or about April 29, 1938, petitioner made and caused to be made false and misleading statements in reports filed pursuant to the Act and the rules and regulations thereunder (R. 23).

The charge was based upon that portion of Section 32 (a) which penalizes—

> any person who willfully and knowingly makes or causes to be made any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder * * * which statement was false or misleading with respect to any material fact. * * *

Petitioner is incorrect in arguing that he was charged with violation of the registration provisions of the Act, any rule thereunder, or any section of the Act other than this part of Section 32 (a). The indictment alleged that false statements were made and caused to be made in documents (R. 23–24)—

> filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934, and in accordance with the rules and regulations prescribed by the Securities & Exchange Commission, which said rules and regulations were

[4] Whenever the indictment is referred to the reference is to Count 13, under which petitioner was convicted.

> necessary and appropriate for the proper protection of investors, and to insure fair dealing in connection with the securities of McKesson & Robbins, Inc., an issuer of securities registered on a national securities exchange, to wit, the New York Stock Exchange; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 15, Sections 78m and 78ff, United States (Code.)

These allegations did not constitute a charge that the petitioner had not filed reports required by the registration provisions. On the contrary, it is plain that the only offense alleged was false filing. The parenthetical reference at the end of the count to Section 78m of Title 15 (Section 13 of the Act) merely identified the section under which the document was required to be filed. It was no part of the charge. *Williams* v. *United States,* 168 U. S. 382, 389; *Prussian* v. *United States,* 282 U. S. 675, 680–681.

Since petitioner was not charged with a violation of the registration provisions of the Act, he has no standing to question them. *Kay* v. *United States,* 303 U. S. 1; *United States* v. *Moriarity,* 106 Fed. 886 (C. C. S. D. N. Y.); *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 315 (S. D. N. Y.), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d); cf. *Heald* v. *District of Columbia,* 259 U. S. 114.

In the *Kay* case, pursuant to the terms of the Home Owners Loan Act of 1933, a second mortgagee executed a consent to accept H. O. L. C. bonds in settlement of her claims. She falsely stated her claims and was indicted under the section of the statute providing that "whoever makes any statement knowing it to be false * * * for the purpose of influencing * * * the action of the Home Owners Loan Corporation * * * shall be punished * * *." This Court held that (pp. 6–7):

> When one undertakes to cheat the Government or to *mislead* its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or *mislead* is made are without constitutional sanction. * * * Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (§ 9) is clearly applicable. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 184. (Italics ours.)

II

We have shown that petitioner is not entitled to raise the constitutional questions with respect to Section 13. In any event, it seems clear that

there is no merit to petitioner's point that Congress did not make adequate provision of legislative standards to guide the Commission in carrying out its administrative function of filling in the details.

The Securities Exchange Act of 1934 was passed following a Senate investigation of stock exchange practices, the buying, selling, and hypothecating of securities listed on stock exchanges, and various other related practices.[5] The investigation led to findings by the Congress, incorporated in the Act (Section 2; U. S. C., Title 15, Sec. 78 (b)), that—

> For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions: * * *.

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[5] See Senate Report 1455, 73d Congress, 2d Session.

To achieve such purposes, the Act provides, *inter alia,* for the registration of stock exchanges and for the registration of securities listed on such exchanges. Registration of a security is accomplished by the filing of an application which must contain certain specified information and documents concerning the issuer and the security. Section 12 (b) sets forth with particularity the subject matter and types of reports to be filed (Appendix, *infra,* pp. 15–17). Section 13 (Appendix, *infra,* p. 17) requires issuers of securities registered on a national securities exchange to keep reasonably current the information and documents specified in Section 12. Thus, it seems clear that in these sections Congress fully set forth the scope and nature of the information to be prescribed by the Commission.

Section 13 provides that the Commission can only require the specified information, documents, and reports in accordance with such rules and regulations as it finds "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." A similar provision is contained in Section 12 (b) (2).

In *Wright* v. *Securities and Exchange Commission,* 112 F. (2d) 89 (C. C. A. 2d), the court below held that the "protection of investors is a sufficiently definite criterion to guide the Commission."

It is quite clear, we submit, that in Sections 12 and 13 Congress made ample provision of legislative standards for the Commission's rule-making power thereunder, and that the action of the Commission in providing the details under such precise legislative guidance is administrative in character.

The standard of guilt by which petitioner is to be judged must be found in the statutory provision under which he was indicted. That provision reads:

> * * * any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed * * * which statement was false or misleading with respect to any material fact * * *.

It is difficult to conceive of a more definite standard. The phrase "any statement * * * which * * * was false or misleading with respect to any material fact" contains two concepts—those of truth and materiality—concepts which are commonly applied not only by judge and jury, but by laymen in the conduct of their daily affairs. They are found in numerous Federal statutes.[6]

Substantially the same standards involved in this case were upheld in *Coplin* v. *United States,* 88 F.

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[6] See, for example, U. S. C., Title 18, Section 231; U. S. C., Title 18, Section 80; U. S. C., Title 12, Section 1467 (a); U. S. C., Title 8, Section 220 (c).

(2d) 652 (C. C. A. 9th), certiorari denied, 301 U. S. 703, where the offense charged was the obtaining of money by means of "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," in violation of Section 17 (a) (2) of the Securities Act of 1933, c. 38, 48 Stat. 74 (U. S. C., Title 15, Sec. 77q (a) (2)).

That portion of Section 32 (a) under which the petitioner was indicted is certain and definite enough for any reasonable and well-intentioned individual to understand. *Kay* v. *United States,* 303 U. S. 1; *Omaechevarria* v. *Idaho,* 246 U. S. 343; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77; *Commonwealth* v. *Reilly,* 248 Mass. 1; *Jasnowski* v. *Connally,* 192 Mich. 139.

In support of his contention that Section 32 (a) sets forth no definite and ascertainable standard of guilt, petitioner argues that the standard is a subjective one because the reports, documents, and applications may differ from time to time pursuant to possible changes in the rules and regulations promulgated by the Securities and Exchange Commission (Br. 15). But the standard set forth in that portion of the statute under which petitioner was convicted remains fixed regardless of what documents or reports may be required to be filed. It is the simple standard of truth.

III

Petitioner contends that the indictment is faulty in that it does not allege petitioner to be a person subject to the provisions of Section 13 of the Act or any other section thereof. Section 13 requires issuers of securities registered on a national securities exchange to file specified documents. The indictment charged that the filing was made in connection with the securities of McKesson and Robbins, Inc., an issuer of securities so registered. Petitioner, an officer of McKesson and Robbins, Inc. (see R. 7), was alleged to have made and caused to be made materially false statements in the reports filed.

Obviously there was no charge of failure to file. On the contrary, the indictment alleged that the documents were filed with the New York Stock Exchange on or about a specified date. Since there was no charge of violation of Section 13, there was no need to allege that petitioner was within the class specified by that section.

Petitioner was found guilty of having violated that portion of Section 32 (a) which penalizes specified conduct on the part of "any person." That Congress did not intend to limit this subsection to particular classes of persons is clearly indicated by reference to subsection (b) of the same section. There the penalty provision specifically applies only to an issuer. See also Section 32 (c). A similar distinction is found in other

sections of the Act. Thus, subsections (a) and (b) of Section 9 (U. S. C., Title 15, Sec. 78i) make it unlawful for "any person" to engage in manipulative practices, while subsection (c) of Section 9 applies only to a "member of a national securities exchange." Section 10 (U. S. C., Title 15, Sec. 78j) applies to "any person." Section 15 (c) (U. S. C., Title 15, Sec. 78o) proscribes certain conduct on the part of brokers and dealers. If Congress had intended by Section 32 (a) to limit criminal responsibility for false statements made in the described documents to a particular class of persons, it would have so stated, as it did in analogous instances throughout the Act.

It would seem clear, therefore, that the crime charged did not require allegation and proof that the offender was an issuer or member of any specified class.

IV

Petitioner claims that the indictment does not charge an offense under Section 32 (a) in that it fails to charge the making of false statements *in* the documents required to be filed. The indictment alleges that the defendants "did make and cause to be made false and misleading statements with respect to material facts in certain applications, documents, and reports filed" (R. 23). Petitioner tortures this language to mean that the false statements were made *dehors* the documents with respect to facts contained in the documents.

In effect, petitioner's contention that the charge is fatally defective rests upon the absence of commas preceding and following the phrase "with respect to material facts." The contention is clearly frivolous since the intendment of the indictment's language is plainly that the defendant made materially false and misleading statements *in* the documents which were filed.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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